

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PENELOPE J. HUGHES

Claimant

VS.

RS STAFFING

MID SOUTH

Respondents

AND

LEGION INSURANCE

Insurance Carrier

AND

WORKERS COMPENSATION FUND

Docket No. 1,010,627

PENELOPE J. HUGHES

Claimant

VS.

RS STAFFING

MID SOUTH

Respondents

AND

LIBERTY MUTUAL INSURANCE

Insurance Carrier

Docket No. 1,010,628

ORDER

One of the respondents (RS Staffing) requested review of the November 1, 2004 Award by Administrative Law Judge (ALJ) Steven J. Howard. The Board heard oral argument on April 26, 2005.

APPEARANCES

John G. O'Connor, of Kansas City, Kansas, appeared for the claimant in both docketed claims. M. Doug Bell, of Coffeyville, Kansas, appeared for respondent RS Staffing in both docketed claims. Bruce L. Wendel, of Kansas City, Missouri, appeared for respondent RS Staffing and Liberty Mutual Insurance in Docket No. 1,010,628. David J. Bideau, of Chanute, Kansas, appeared for the Kansas Workers Compensation Fund (Fund) in Docket No. 1,010,627.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, all the parties agreed during oral argument that the 25 percent permanent partial functional impairment assigned by the ALJ was acceptable and that there was no remaining dispute as to claimant's entitlement to temporary total disability benefits for the period September 9, 2002 to March 10, 2003.

ISSUES

The ALJ awarded claimant a 25 percent functional impairment¹ for an injury sustained on June 17, 2002. This award was entered against respondent RS Staffing in Docket No. 1,010,627 only, and because RS Staffing was admittedly uninsured for that date, the ALJ concluded RS Staffing is solely responsible for the Award as well as payment of the temporary total disability benefits paid to the claimant.² Claimant concedes that he offered no evidence as to RS Staffing's inability to pay.

RS Staffing appeals the ALJ's Award and argues that the ALJ erred in finding claimant's permanent impairment was caused by an accident on June 17, 2002. Rather, RS Staffing maintains claimant's need for medical treatment and her resulting permanency occurred as a result of her September 7, 2002 injury and as such, RS Staffing and its

¹ The Award states claimant is granted a 25 percent *work disability*. This is an error. Claimant requested and was granted a functional impairment only.

² ALJ Award (Nov. 1, 2004) at 7.

carrier on the risk as of the date of that second accident should be responsible for any permanency.

Alternatively, RS Staffing maintains that if June 17, 2002 is the appropriate accident date, then the insolvency of the insurance carrier compels a finding that the Fund is responsible for any Award entered against RS Staffing.³

Liberty Mutual, who is RS Staffing's insurance carrier on the risk for the second accident only, (Docket No. 1,010,628) maintains the ALJ's Award should be affirmed in all respects. Liberty Mutual asserts that Dr. Preston Brent Koprivica steadfastly maintains that claimant's pain and numbness following her initial June 17, 2002 accident never subsided, and that the discectomy and fusion claimant had in January 2003 were a natural and probable consequence of the June 17, 2002 accident, rather than the September 7, 2002 accident.

The Fund agrees with the ALJ's finding that the evidence presented by the parties was insufficient as a matter of law to establish that RS Staffing is insolvent or cannot be located as required by K.S.A. 44-532a. As such, the Fund maintains the ALJ's Award should be affirmed on that issue. Alternatively, the Fund suggests that the evidence establishes that the September 7, 2002 accident, rather than the earlier June 17, 2002 accident, gave rise to claimant's ultimate need for surgery and is responsible for her ultimate permanency. Thus, the Fund contends that RS Staffing and Liberty Mutual are responsible for payment of any benefits due under the Act.

The issues to be resolved are as follows:

1. Of claimant's two separate dates of accidents, which of the accidents is responsible for claimant's permanent partial impairment? and
2. What, if any, responsibility does the Kansas Workers Compensation Fund have?

Claimant takes no position in this appeal other than to state that the evidence would have supported an award of 25 percent disability in favor of claimant against RS Staffing on either date of accident, and that if the November 1, 2004 Award of the ALJ is affirmed with respect to docket 1,010,627, it is claimant's intent to seek modification and review as to the liability of the Fund if respondent is hereafter shown to be insolvent or unable to pay the compensation awarded.⁴

³ RS Staffing's Brief at 6 (filed in Dec. 9, 2004).

⁴ Claimant's letter to the Board (filed Jan. 7, 2005).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was injured on the job on June 17, 2002 when she was reaching for a plastic tote filled with prescription orders. She testified "I picked it up and when I picked it up it kind of like threw my arm down and I heard a pop in my neck."⁵ The tote weighed about 20-25 pounds. This is not the usual weight for a tote so it caught claimant off guard. Claimant reported her injury to Leigh Brown, and sought treatment from family physician Dr. Phillip Martin. Claimant was diagnosed with cervical radiculopathy in June of 2002. She again notified respondent of her injury and asked to see a doctor. Unfortunately, unrelated personal events intervened and claimant did not follow up. She did, however, continue working for respondent at her normal duties. She experienced some limitation in the range of motion to her neck as well as pain radiation into her arm. These symptoms did not resolve and continued to get worse each and every day.

On September 7, 2002, claimant was hurt again while lifting totes onto a conveyor belt. This time the tote she was lifting was empty, but two of them were stacked together. She stated that she was "lifting with my left hand to pull the empty totes off and when I went to pull one of the totes up to bring it over my right hand I couldn't get it apart. My arm slipped and it jerked and I heard another pop in my neck."⁶ This injury was in the same area as the June 17, 2002 injury.

Claimant provided notice to respondent and was ultimately sent to see Dr. Russell Yocum on September 16, 2002. Claimant was sent for an MRI and referred to and saw Dr. Frank Holladay on October 14, 2002. On December 6, 2002, claimant underwent a three level anterior cervical discectomy. She was taken off work in September of 2002, and did not return until March 10, 2003.

Claimant presently complains of "a little bit of limitation of turning to the left on driving, I have limitation of going up and down with my neck, I have trouble with doing some of the outside activities of gardening and stuff with my neck being down and stuff. A lot of stiffness on trying to get it to turn."⁷ She must now completely turn her body to reach a tote instead of turning only the left side of her body.

⁵ R.H. Trans. at 12.

⁶ *Id.* at 17.

⁷ *Id.* at 25-26.

At her lawyer's request, Dr. Preston Brent Koprivica saw claimant on July 2, 2003. Upon examination, the doctor opined that as a result of claimant's June 17, 2002 work injury she "sustained permanent aggravating injury with the development of multilevel disk protrusions and resultant left-sided cervical radiculopathy. I do not believe the September 7, 2002, described event represents any additional permanent aggravating injury. Rather, this was evidence of her ongoing impairment associated with the presence of the multilevel cervical disk protrusions."⁸ He further testified that the June 2002 event caused claimant to sustain a torn annulus which allowed disc material to protrude, as evidenced by her radicular symptoms. He also indicated that but for the gap in treatment, claimant would likely have had an MRI that would have revealed the tear.⁹

The ALJ found that claimant sustained a 25 percent permanent impairment to the whole body. He also concluded, based upon the testimony offered by Dr. Koprivica, that claimant sustained this 25 percent permanent impairment as a result of the June 17, 2002 accident. He, therefore, assessed this against RS Staffing only. The Board has considered the evidence offered by the parties and concludes the ALJ's finding as to date of accident should be affirmed. Dr. Koprivica's testimony is uncontroverted on this issue, and although counsel for RS Staffing suggested that Dr. Koprivica did not have sufficient information to make this determination, the Board is not persuaded. The ALJ's finding as to the 25 percent permanent partial impairment to the body as a whole as a result of the June 17, 2002 accident is affirmed.

The ALJ further concluded that there was an insufficient amount of evidence to determine whether RS Staffing is insolvent or cannot be located. Thus, he denied claimant's request to direct the Fund to pay any Award. The Fund is responsible for the payment of benefits when an employer has no workers compensation insurance and the company is financially unable to pay the benefits required by the Act.¹⁰ In this instance, it appears to be conceded that RS Staffing was uninsured for the June 17, 2002 accident. Nevertheless, the ALJ concluded there is no evidence within the record to suggest that RS Staffing is not a going concern or is otherwise unable to pay the benefits ordered to be paid and the Board agrees. Thus, the ALJ's Award is affirmed on the issue of Fund liability.

All other findings are hereby adopted by the Board as if fully set forth herein to the extent they are not inconsistent with the above.

⁸ Koprivica Depo., Ex. 2 at 9.

⁹ *Id.* at 9-10.

¹⁰ K.S.A. 44-532a.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated November 1, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
M. Doug Bell, Attorney for Respondent and its Insurance Carrier
Bruce L. Wendel, Attorney for Liberty Mutual Insurance
David J. Bideau, Attorney for the Fund
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director